No. 83-1438

In the Supreme Court of the United States

OCTOBER TERM, 1983

SOPHIA E. SELMAN, EXECUTRIX OF THE ESTATE OF RICHARD J. SELMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' decedents, two retired Navy officers who held the rank of captain but were compensated for their active service at the higher rate generally payable to rear admirals (lower half), were entitled to the higher rate of pay upon their retirement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 723 F.2d 877. The opinion of the United States Claims Court (Pet. App. 32a-49a) is reported at 1 Cl. Ct. 702. The reports of the Board for Correction of Naval Records (Pet. App. 50a-98a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1983 (Pet. App. 104a-105a). A petition for rehearing was denied on December 1, 1983

(Pet. App. 99a-103a, 105a).[1] The petition for a writ of certiorari was filed on February 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. George S.H. Sharratt, Jr. served as an assistant judge advocate general (AJAG) in the United States Navy from July 16, 1968, until October 1, 1970, when he retired after 20 years of service. Richard J. Selman served as an AJAG from August 20, 1968, until May 1, 1972; he then served in another position until he retired with a disability on July 1, 1973.[2] During their service as AJAGs, both men held the rank of captain and were compensated on the basis of an 06 pay grade. Pet. App. 2a-3a, 33a-34a.

In 1972, petitioners brought suit in the former Court of Claims, contending that they should have been paid on the basis of an 07 pay grade pursuant to 37 U.S.C. (1976 ed.) 202(*l*). Section 202(*l*) entitled AJAGs "to the basic pay of a rear admiral (lower half)"; rear admirals (lower half) are compensated at the 07 pay grade level. The Court of Claims ruled in petitioners' favor. *Selman* v. *United States* (*Selman I*), 498 F.2d 1354 (1974). Although

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[1] By order entered December 1, 1983, the court of appeals amended its prior opinion by the substitution of certain language and the addition of other language, and denied the rehearing petition in all other respects. Pet. App. 99a-102a, 104a-105a.

[2] These retired officers, who were the plaintiffs at the outset of the litigation below, died in the course of subsequent proceedings. Their widows, as executrixes of their estates, are the petitioners herein. For convenience, we use "petitioners" to refer to both the officers and their widows.

the court's ruling raised petitioners' active duty pay to the 07 grade, it did not promote them from captains to rear admirals. Pet. App. 3a-4a, 34a-35a.

2. At the time petitioners retired, the Secretary of the Navy, acting for the President, had discretion pursuant to 10 U.S.C. (1970 ed.) 5149(b) to promote retiring AJAGs to the rank of rear admiral (lower half) on the retired list, which would have entitled petitioners to retired pay at pay grade 07 (*ibid.*).[3] This discretion was not exercised by the Secretary of the Navy, however. Accordingly, both petitioners retired at pay grade 06, the pay grade associated with their rank as captains, rather than at the higher active duty pay they had been awarded in *Selman I*. Pet. App. 4a-5a, 35a-36a.

In 1976, the officers petitioned the Board for Correction of Naval Records (BCNR or the Board) for the higher retired pay grade, alleging that the Secretary of the Navy had never been given the opportunity to exercise the discretion delegated to him by the President pursuant to Section 5149(b) to promote them to rear admirals (lower half) when they retired. In support of their petitions, the officers produced letters from Senators John Chafee and John

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[3] 10 U.S.C. (1970 ed.) 5149(b) read in pertinent part:

> An officer who is retired while serving as Assistant Judge Advocate General of the Navy under this subsection or who, after serving at least twelve months as Assistant Judge Advocate General of the Navy, is retired after completion of that service while serving in a lower rank or grade, may, in the discretion of the President, be retired with the rank and grade of rear admiral (lower half). If he is retired as a rear admiral, he is entitled to retired pay in the lower half of that grade, unless entitled to higher pay under another provision of law.

W. Warner, who had served as Secretaries of the Navy at the time the officers retired. Both Senators stated that they would have promoted petitioners had they been given the opportunity to do so. Pet. App. 4a-5a, 36a-37a & n.4.

In 1981, the BCNR declined to act on the petitions (Pet. App. 50a-98a). The Board stated (*id.* at 59a, 84a-85a) that since there were "no specific criteria to be applied in determining whether an officer is deserving of retirement as a rear admiral pursuant to [Section 5149(b)]," it "was unable to conclude that Presidential discretion * * * should have been exercised." Instead, the BNCR referred both petitions to the current Secretary of the Navy "for his determination as to whether or not Petitioner[s] should have been retired in the grade of rear admiral (lower half)" (Pet. App. 67a, 92a), noting (*ibid.*) that "the current Secretary * * * still holds the authority to exercise Presidential discretion under [Section 5149(b)]." The current Assistant Secretary of the Navy, Manpower and Reserve Affairs, summarily denied both petitions on July 16, 1982 (Pet. App. 6a, 38a).

3. Two months later, petitioners filed suit in the United States Claims Court,[4] alleging that although they had not been promoted to the rank of rear admiral (lower half) on retirement, their retired pay nevertheless should be recomputed at the 07 pay grade at which they were compensated for their active duty service as a result of *Selman I*. Alternatively, they claimed that the Assistant Secretary of

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[4] Petitioners initially filed their action in the then United States Court of Claims on September 30, 1982. Effective October 1, 1982, jurisdiction was transferred to the new United States Claims Court. Pet. App. 6a.

the Navy's July 16, 1982 refusal to promote them should be overturned because it was arbitrary and capricious.

The court rejected the latter argument at the outset. It explained that since Section 5149(b) appointments are "entirely discretionary," petitioners could demonstrate no entitlement to a promotion and, therefore, no entitlement to a money judgment. Because the Claims Court's jurisdiction could be invoked only on the basis of a claim for money damages, the court held that it lacked jurisdiction to review the July 16, 1982 decision of the Secretary, acting through the Assistant Secretary. Pet. App. 38a-41a.

The court next rejected petitioners' claim that they were entitled to retired pay at the 07 grade by virtue of the fact that they had been paid at that grade during their active service as AJAGs. As the court noted, this claim turned on the proper construction of 10 U.S.C. 1201 and 1401 and 10 U.S.C. (1970 ed.) 6323, which provide that retired pay is based upon the basic pay of the "grade" in which the officer retired.[6] Petitioners claimed that these provisions

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[6] Captain Sharratt retired after 20 years of active service under 10 U.S.C. (1970 ed.) 6323, which provided in pertinent part:

> (c) Unless otherwise entitled to a higher grade, each officer retired under this section shall be retired—
>
> (1) in the highest grade, permanent or temporary, in which he served satisfactorily on active duty as determined by the Secretary of the Navy * * *.

Captain Selman was retired for physical disability under 10 U.S.C. 1201 and 1401. Section 1401 provides that retired pay shall be based on the "monthly basic pay of grade to which member is entitled under [10 U.S.C.] 1372." Section 1372, in turn, provides in pertinent part:

> Unless entitled to a higher retired grade under some other provision of law, any member of an armed force

refer to pay grades—*e.g.*, 06, 07, 08, etc., but the government contended that they refer to officer grades—*i.e.*, commander, captain, rear admiral, etc. The Claims Court agreed with the government that when the word "grade" is used without a qualifying adjective in the retired pay statutes, it invariably refers to "officer grade." Since petitioners had never served in the officer grade of rear admiral, the court held that their retired pay was properly computed on the basis of the 06 pay grade applicable to captains. Pet. App. 41a-49a.

4. The court of appeals affirmed (Pet. App. 1a-31a). In that court, petitioners advanced two separate legal theories. First, they alleged that the BCNR's action was arbitrary and capricious because the Board itself should have acted under 10 U.S.C. 1552 * to correct the error that occurred when Secre-

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who is retired for physical disability under section 1201 or 1204 of this title * * * is entitled to the grade equivalent to the highest of the following:

(1) The grade or rank in which he is serving on the date when his name is placed on the temporary disability retired list * * *.

(2) The highest temporary grade or rank in which he served satisfactorily, as determined by the Secretary of the armed force from which he is retired.

* 10 U.S.C. 1552 provides in pertinent part:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice * * *. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

taries Chafee and Warner were not given the opportunity to promote them, rather than referring their claims to the current Secretary of the Navy (Pet. App. 6a-7a). Second, they alleged, as they had in the Claims Court, that they were entitled to be paid on the basis of the 07 pay grade associated with the rank of a rear admiral (lower half) since they had been paid on that basis while serving as AJAGs (Pet. App. 7a-8a).

At the outset, the court of appeals held, contrary to the Claims Court, that the latter court had jurisdiction to review the Board's referral of the officers' petitions to the current Secretary and the denial of the petitions by the Secretary, acting through the Assistant Secretary. According to the court of appeals (Pet. App. 9a-10a), the Secretary's "action, or decision not to act," was taken not pursuant to the discretionary authority granted in Section 5149(b), but rather pursuant to 10 U.S.C. 1552, which provides for the Secretary, acting through the BCNR, " 'to correct an error or remove an injustice.' "

The court of appeals concluded, however, that neither the Board nor the Secretary had acted arbitrarily or capriciously in declining to promote petitioners, even though the former Secretaries had stated they would have decided the issue differently (Pet. App. 10a-15a). The court noted (Pet. App. 11a (emphasis by the court)) that "[t]here is no requirement that the BCNR *must* take final action in any situation" and that it therefore "was entirely proper for the BCNR to merely pass the record to the [current] Secretary so that he could determine the appropriate action." The court further observed (*id.* at 19a-20a) that a Service Secretary "does not act in such matters on his own motion, when in office," but rather "on the basis of advice emanating from the bureaus

and offices that have cognizance of the matter at hand." In this regard, the court took cognizance (*id.* at 21a) of strenuous objections made by the Bureau of Naval Personnel that "the promotion of any officer without the recommendation of a selection board would be destructive of morale and resented by officers of every rank whose promotions had to be passed on by such a board."[7] The court accordingly determined that there was sufficient evidence before the BCNR and the current Secretary to support the decision that petitioners' promotion in the retirement ranks was not warranted, and there was therefore no injustice to correct, notwithstanding the former Secretaries' ex post facto opinions that they would have promoted the officers, had they been given the opportunity. Although the court acknowledged that the Secretary had committed a technical violation of 32 C.F.R. 723.7 by failing to state expressly his reasons for denying the promotions, it held that any such error was harmless because the basis for the action—the objection by the Bureau of Navy Personnel—was easily discernible from the evidence that was submitted by the Board as part of the administrative record. Pet. App. 14a-16a.

With respect to petitioners' alternative argument, the court of appeals held, as had the Claims Court, that the word "grade," as used in the statutes governing the computation of retired pay, means "officer grade," not "pay grade" (Pet. App. 23a-30a).

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[7] The court of appeals noted (Pet. App. 21a-22a) that the Bureau's objection could be taken as disagreement with 10 U.S.C. (1970 ed.) 5149(b) itself. Nevertheless, the court held that that fact would not prevent the Secretary from adopting the Bureau's position as his own since "there is nothing to show that Congress intended to require *any* promotions" (Pet. App. 22a (emphasis added)).

ARGUMENT

The decision of the court of appeals is correct and represents nothing more than a routine exercise in statutory construction. Moreover, the court's decision does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioners' principal contention (Pet. 12-15, 18-23) is that the court of appeals erred in not remanding this case to the Secretary for the entry of findings as to why he denied their claims for promotion to rear admiral on the retired list. They rely (*id.* at 12) on Navy regulations (32 C.F.R. 723.7 and 32 C.F.R. 723.3(e)(5)) that require that a decision denying relief must be accompanied by a statement of reasons. As noted above (page 8, *supra*), the court of appeals considered this issue, but concluded that the omission of findings was harmless error—a conclusion that petitioners now claim (Pet. 14) "introduces a wild card into the standards of judicial review of administrative decisions, encourages laxity by administrative agencies and, if unchecked, will ultimately increase the workload of federal courts in reviewing administrative agency decisions."

Petitioners' objections are quite overstated. The court of appeals did not condone the omission of administrative findings; to the contrary, it stated expressly (Pet. App. 15a) that it "[did] not sanction such action" but "that, in this case, the error is harmless." The court reasoned that the omission was not fatal here because it was not left " 'completely in the dark as to the facts and evidence upon which the [Secretary] * * * based his judgment' " (Pet. App. 15a, quoting *USV Pharmaceutical Corp.* v. *Secretary of HEW*, 466 F.2d 455, 462 (D.C. Cir. 1972)), but

rather could discern the basis for the denial from the record.

That record, as noted above (page 8, *supra*) and as petitioners acknowledge (Pet. 9), included a recommendation against promotion by Vice Admiral James D. Watkins, the Chief of Naval Personnel. Vice Admiral Watkins believed that it would be inequitable to promote petitioners to rear admiral (lower half) rank on retirement since they had not been appointed to that rank by a selection board, as is the case with other officers retired at comparable rank. The court of appeals thus understood, and petitioners are well aware, that the current Secretary of the Navy denied their claims because the views of the Chief of Naval Personnel prevailed. Since the administrative action could readily be reviewed by the court to the extent necessary to determine that it was not arbitrary or capricious (Pet. App. 15a), a remand of this case, which has been pending before the BCNR or the courts for eight years, for the entry of a statement of reasons would exalt form over substance.[8] Furthermore, the court of appeals correctly

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[8] Contrary to petitioners' assertion (Pet. 13-14), the decision below does not conflict with *Environmental Defense Fund* v. *EPA*, 465 F.2d 528 (D.C. Cir. 1972), or *USV Pharmaceutical Corp.* v. *Secretary of HEW*, 466 F.2d 455 (D.C. Cir. 1972). Both of those cases stand for the unremarkable proposition, with which the decision below does not take issue, that administrative agencies generally are required to provide a statement of the reasons underlying their actions. 466 F.2d at 461-462; 465 F.2d at 538-541. Neither of those cases involved the situation presented here, in which effective judicial review is possible, notwithstanding the lack of a statement of reasons, by reference to a record that clearly discloses the basis for the administrative action. Indeed, in *Environmental Defense Fund* v. *EPA*, 465 F.2d at 537, the court made clear that it "do[es] not demand sterile formality. *In appropriate*

concluded (Pet. App. 14a) that the Secretary's decision was entitled to a presumption of administrative regularity and that petitioners failed to rebut that presumption by producing any evidence that the Secretary had acted on the basis of anything other than the record before him.

2. Petitioners also argue that both courts below construed the applicable military retirement statutes incorrectly and in a manner inconsistent with *Powers* v. *United States*, 401 F.2d 813 (Ct. Cl. 1968). In fact, the courts' interpretation of the statute is manifestly correct and is entirely consistent with *Powers*, which was a decision by the predecessor of the court below and thus would not present an inter-circuit conflict in any event.

As both courts below noted (Pet. App. 42a-43a; *id.* at 26a), the question of statutory construction presented by this case—whether the word "grade," as used in the retired pay statutes, refers to "pay grade" or "officer grade"—"[n]ormally * * * is of no consequence because pay grades are strictly correlated to officer grades." See 37 U.S.C. 201(a). The question is of significance in this case only because of the court of appeals' holding in *Selman I* that AJAGs who held the officer grade of captain nevertheless were entitled to the pay grade of rear admiral (lower half) while serving as AJAGs. Indeed, any continuing significance of even this narrow question has been eliminated by the repeal of 37 U.S.C. (1976 ed.) 202(*l*) (see 94 Stat. 2904), on which the holding in *Selman I* was based.

In any event, the lower courts' resolution of the discrete question of statutory construction presented

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cases, if the necessary articulation of basis for administrative action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference" (emphasis added; footnote omitted).

here is correct. As noted above (note 5, *supra*), Captain Sharratt retired after 20 years of active service pursuant to 10 U.S.C. (1970 ed.) 6323(c). He thus was entitled to be retired "in the highest grade or rank in which he served satisfactorily." Likewise, Captain Selman, who retired for reasons of physical disability, was entitled to be retired at "[t]he highest temporary grade or rank in which he served satisfactorily" (10 U.S.C. 1372(2)). As the courts below pointed out (Pet. App. 28a (emphasis by the court); *id.* at 44a), the plain language of the statute defines the word "grade," for purposes of Title 10, as "a step or degree, in [the graduated] scale of *office* or *military rank*." See 10 U.S.C. 101(18). Both courts further noted (Pet. App. 44a; see also *id.* at 28a) that "[w]hile the concept of pay grades is used from time to time in title 10, * * * its use is carefully delineated by reference to the full phrase 'pay grade.' By contrast, whenever 'grade' is used without a qualifying adjective, it invariably refers to what we have been terming as 'officer grade.' "

As both courts below recognized (Pet. App. 28a-29a, 45a-48a), *Powers* v. *United States*, *supra*, on which petitioners rely (Pet. 15-16), in fact supports the view that the word "grade," as used in Title 10, refers to "officer grade," rather than "pay grade." The plaintiff in *Powers* had served as deputy and assistant JAG in the grade of captain until his appointment to the grade of rear admiral for such time as he should continue to serve as deputy and assistant JAG. Because 37 U.S.C. (1976 ed.) 202(i)(3) entitled deputy JAGs to be paid at "the highest rate of their rank," Powers skipped the 07 pay grade applicable to rear admirals of the lower half and was paid at the higher rate applicable to the rank of rear admiral—the 08 pay grade applicable to rear ad-

mirals of the upper half. Upon his retirement under 10 U.S.C. (1970 ed.) 6323(e), Powers received retired pay based on the 07 pay grade at which rear admirals of the lower half were compensated, because the government reasoned that 07 was the "basic pay" of the grade (rear admiral) in which Powers retired. The Court of Claims reversed on two separate grounds (401 F.2d at 815): First, that the "grade" at which Powers had retired was rear admiral of the upper half, not rear admiral of the lower half. Second, "[e]ven if [it] were not to consider rear admiral of the upper half and lower half as separate grades," there was nothing any more "basic" about the 07 pay grade than the 08 pay grade with respect to the grade of rear admiral. Because the grade of rear admiral peculiarly has both pay grades associated with it, the court concluded that Powers' retired pay should be based on the higher, 08 rate of pay that he had actually received.

The *Powers* court's discussion makes clear that it viewed the word "grade," as used in Section 6323, as referring to officer grade and not pay grade; otherwise, the foregoing, detailed analysis would have been unnecessary. Moreover, the broad language contained in the opinion on which petitioners apparently rely (Pet. 15)—"that the statutory scheme clearly bares the Congress' intention that plaintiff's retired pay be based upon the highest rate of pay he received while on active duty" (401 F.2d at 814)—is dictum that merely describes the ultimate result reached by the court. The narrow holding of the case is that when there are two pay grades associated with an officer's retired officer grade, the retired pay must be computed on the basis of the pay actually received. Since neither of the officers involved in this case ever served

in an officer grade higher than captain, and since only one pay grade—grade 06—is associated with that officer grade, their retired pay was correctly computed under the controlling statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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